

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN BRYAN SPENCE,

Defendant and Appellant.

C063018

(Super. Ct. No. 072082)

This is an appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436. In June 2007, defendant Kevin Bryan Spence pled no contest to threatening to commit a crime resulting in death or great bodily injury (Pen. Code, § 422) and admitted serving a prior prison term pursuant to Penal Code section 667.5. As part of his plea, defendant also agreed to a four-year prison sentence, the execution of which would be suspended and defendant would serve three years' felony probation. In July 2007, defendant was sentenced according to his plea.

In January 2009, defendant was arrested for possessing narcotics paraphernalia and a deadly weapon (i.e., a baseball bat), both of which were found in a locked room in defendant's residence. The probation department moved to violate his probation based on the arrest and defendant's failure to make payments as ordered by the court. Defendant challenged the probation violation allegations and a contested probation violation hearing was held over two days in April 2009.

At the contested probation violation hearing, the trial court heard testimony from defendant, his mother, his father, and several law enforcement officers. Defendant's mother, Ginger Spence, testified that in January 2009, defendant was living with her in the family home. She explained there was a lock on defendant's bedroom door, as well as the bedroom door adjacent to defendant's room, his brother, Timothy's bedroom.¹ She did not have the key to either of these locks, but defendant did and he went between the rooms as he wished.

On January 13, 2009, probation officers came to Ms. Spence's home to conduct a probation search of defendant's residence. Defendant was not home, but Ms. Spence gave the officers permission to enter. During the search, Ms. Spence

¹ Ms. Spence signed a statement to the probation officers indicating defendant installed the locks without her permission, but testified at the hearing that the locks may have been installed before defendant moved in.

told the officers she did not have keys to the locked bedrooms, only defendant did, and she did not know how to contact him or when he would be home. Thus, the officers broke down the locked doors.

Inside Timothy's room, the officers found a baseball bat and a glass pipe, of the type commonly used to smoke cocaine and methamphetamine. The pipe was found on top of a support beam in the bedroom closet and there was methamphetamine residue in it. There was no other baseball equipment in the room and the only furniture in the room was a circular card table and a single chair. Ms. Spence denied owning either the bat or the pipe.

Defendant's father testified on defendant's behalf. He explained that, although he and defendant's mother were divorced, he was frequently at the family home performing maintenance on the house. He also described how, six months before defendant's arrest, immediately after Timothy and his family moved out of the home, Mr. Spence found the baseball bat in the backyard. He claimed to have put the bat in the "guest room" and told his wife not to get rid of it; he said it belonged to his grandson. Mr. Spence further testified that defendant and Timothy each had separate locks for their respective bedrooms, but Mr. Spence had keys to every room in the house.

Defendant also testified on his own behalf. He described moving in with his mother in 2007, when Timothy and his family

were still living there. Defendant denied having a key to Timothy's bedroom, where the pipe and bat were found, but said his parents did. Regardless, defendant admitted he had access to Timothy's bedroom because the door was usually unlocked.

Defendant also claimed not to recognize the pipe found in Timothy's bedroom, and denied using methamphetamine in the prior 12 or 13 years. Defendant and his father both testified that, when defendant was arrested, they both asked defendant's probation officer to test him for drugs, but the officer refused.

The trial court found the testimony that defendant did not have access to Timothy's bedroom was not credible. The court also did not believe Mr. Spence's testimony that he found the baseball bat in the backyard. Finding it to be a "close call," the court sustained the allegations that defendant possessed the methamphetamine pipe and the baseball bat, which the court found to be a dangerous weapon.

In May 2009, the probation department moved to violate defendant's probation again, this time based on a positive drug test. Defendant ultimately admitted the allegation and in September 2009, the court imposed the suspended state prison sentence of four years. Defendant was awarded 388 days of

actual custody credit and 194 days of conduct credit, for a total of 582 days of credit under Penal Code section 4019.²

We appointed counsel to represent defendant on appeal. Pursuant to *People v. Wende, supra*, 25 Cal.3d 436, counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. More than 30 days elapsed, and we received no communication from defendant.

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment (order revoking probation) is affirmed.

CANTIL-SAKAUYE, J.

We concur:

BLEASE, Acting P. J.

HULL, J.

² The recent amendments to Penal Code section 4019 do not operate to modify defendant's entitlement to credit, as he was committed for a serious felony. (Pen. Code, § 4019, subds. (b)(2) & (c)(2); Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 50.)